Supreme Court 80480-0
(Consolidated With Nos. 80584-9 and 81083-4)

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SUPREME COURT OF THE STATE OF WASHINGTON

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SATOMI OWNERS ASSOCIATION, a Washington Non-Profit Corporation,

Respondent,

v.

SATOMI, LLC, a Washington Limited Liability Company,

Appellant.

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# APPELLANT BLAKELEY VILLAGE, LLC AND PETITIONER SATOMI, LLC'S RESPONSE BRIEF REGARDING RCW 64.34.100'S CONFLICT WITH SECTION 2 OF THE FEDERAL ARBITRATION ACT

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In accordance with this Court's September 16, 2008 letter (the "September 16 Letter") requesting supplemental briefing regarding RCW 64.34.100's conflict with section 2 of the Federal Arbitration Act (the "FAA"), appellant Blakeley Village, LLC ("Blakeley Village") and petitioner Satomi, LLC ("Satomi") respectfully submit this response to Respondent's Supplemental Brief Re Conflict Preemption of Washington Condominium Act's Enforcement Provision ("Respondent's Supplemental Brief").

There is no dispute that the prior version of RCW 64.34.100 — the version all entities agree is applicable to respondent Blakeley Commons Condominium Association's lawsuit against Blakeley Village (the "Blakeley Lawsuit") and respondent Satomi Owners Association's lawsuit against Satomi (the "Satomi Lawsuit") — conflicts with section 2 of the FAA.

RCW 64.34.100 was amended in 2005 to add references to chapter 64.55 RCW's alternative dispute resolution provisions and to clarify that the arbitration proceedings provided for in those alternative dispute resolution provisions are "judicial proceedings" under the statute. *See* RCW 64.34.100 (2005). These amendments form the crux of The Pier at Leschi Condominium Owners Association's erroneous contention that ***current*** RCW 64.34.100 does not conflict with the FAA. *See* Respondent's Supplemental Brief at 7. But the Legislature has made clear that those alternative dispute resolution provisions do not apply retroactively to "[a]ctions filed or served prior to August 1,

2005" or "[a]ctions for which a notice of claim was served pursuant to chapter 64.50 RCW prior to August 1, 2005" — the effective date of current RCW 64.34.100. *See* RCW 64.55.005(2)(a) and (b); RCW 64.34.100 (2008). The current version of RCW 64.34.100 therefore does not apply to the Satomi Lawsuit or the Blakeley Lawsuit, given that the Satomi Lawsuit was filed and the notice of claim for the Blakeley Lawsuit was served well before August 1, 2005.[1]

Although *Marina Cove Condo. Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230, 34 P.3d 870 (2001), wrongly decided that the FAA was inapplicable in that case,[2] the *Marina Cove* Court found that prior RCW 64.34.100, in conjunction with RCW 64.34.030,[3] ***rendered unenforceable*** an agreement to submit to binding arbitration certain claims under the Washington Condominium Act, chapter 64.34 RCW (the "WCA"). 109 Wn. App. at 235-37. This Court recently cited that portion of the *Marina Cove* opinion (*i.e.*, the portion of the opinion that

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[1] Indeed, the Satomi Owners Association concedes that prior RCW 64.34.100 applies to the Satomi Lawsuit, and the Blakeley Commons Condominium Association has not argued that current RCW 64.34.100 applies to the Blakeley Lawsuit. *See* Respondent's Supplemental Brief at 7 n.27.

[2] *See, e.g.*, Reply Brief of Appellant Satomi, LLC at 8-13; Brief of Appellant Blakeley Village, LLC at n.38; *Satomi Owners Ass'n v. Satomi, LLC*, 139 Wn. App. 175, 185, P.3d 460 (2007) (concluding that regarding the FAA's applicability, "*Marina Cove's* continuing validity is questionable").

[3] RCW 64.34.030 provides:

> Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived. A declarant may not act under a power of attorney or use any other device to evade the limitations or prohibitions of this chapter or the declaration.

did *not* concern the FAA's applicability) with approval in *Kruger Clinic Orthopaedics, LLC v. Regence BlueShield*, 157 Wn.2d 290, 305-06, 138 P.3d 936 (2006).

In contrast, section 2 of the FAA provides:

> ***A written provision*** in ... a contract evidencing a transaction involving commerce ***to settle by arbitration*** a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, ***or an agreement in writing to submit to arbitration*** an existing controversy arising out of such a contract, transaction, or refusal, ***shall be valid, irrevocable, and enforceable***, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). Thus, there can be no question that prior RCW 64.34.100 conflicts with section 2 of the FAA and is preempted by the FAA in circumstances where the FAA applies. *See, e.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) ("What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal 'footing,' directly contrary to the [FAA's] language and Congress' intent."); *Southland Corp. v. Keating*, 465 U.S. 1, 10, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984) ("The California Franchise Investment Law provides: 'Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any

rule or order hereunder is void.' Cal.Corp.Code § 31512 (West 1977). The California Supreme Court interpreted this statute to require judicial consideration of claims brought under the State statute and accordingly refused to enforce the parties' contract to arbitrate such claims. So interpreted the California Franchise Investment Law directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause.").

Moreover, the Satomi Owners Association and The Pier at Leschi Condominium Owners Association agree that prior RCW 64.34.100 is "preempted [by the FAA] under the conflict preemption doctrine." Respondent's Supplemental Brief at 9 n.29. The Blakeley Commons Condominium Association has conceded the same by ignoring this Court's directive that "counsel for each of the respective Respondents serve and file a supplemental brief by not later than October 22, 2008" regarding the conflict. September 16 Letter at 2.

Accordingly, there can be no question that RCW 64.34.100 conflicts with the FAA, applies to the Satomi Lawsuit and the Blakeley Lawsuit, and is preempted by the FAA if those lawsuits implicate the FAA.

Even if the current version of RCW 64.34.100 applied to the Satomi Lawsuit and the Blakeley Lawsuit, the FAA's conflict with current RCW 64.34.100 is just as unavoidable as its conflict with prior RCW 64.34.100. The Satomi Owners Association and The Pier at

Leschi Condominium Owners Association contend that the FAA does not conflict with current RCW 64.34.100, even though that statute does not allow binding arbitration, because the statute allows non-binding arbitration under chapter 64.55 RCW. As the basis for this erroneous contention, the Associations wrongly assert that the FAA merely requires some form of arbitration and does *not* require enforcement of the particular *terms* of the parties' agreement to arbitrate — such as terms requiring that the arbitration's outcome be ***binding*** on the parties — and that the FAA therefore does not preempt a state statute prohibiting enforcement of the terms of the parties' arbitration agreement, so long as the state statute allows for some kind of arbitration. *See* Respondent's Supplemental Brief at 16-18. This is wrong. Not only does section 2 of the FAA expressly mandate that arbitration clauses "shall be valid, irrevocable, and enforceable," courts have repeatedly held that the FAA preempts state law that would alter the terms of the parties' arbitration agreement. *See, e.g., Cigna Ins. Co. v. Huddleston*, 986 F.2d 1418, 1993 WL 58742, *7-9 (5th Cir. 1993) (opinion not selected for publication[4]) (finding FAA preempted state law regarding time limit for filing motion to vacate, modify, or correct an arbitration award, the court held "when there is a binding arbitration

[4] The Fifth Circuit permits citation to its unpublished opinions and has declared that "[u]npublished opinions issued before January 1, 1996, are precedent." 5TH CIR. R. 47.5.3; *see also* 5TH CIR. R. 28.7. Washington's GR 14.1(b) permits citations to unpublished opinions "if citation to that opinion is permitted under the law of the jurisdiction of the issuing court." A copy of *Cigna Ins. Co. v. Huddleston* is attached hereto, per GR 14.1(b).

provision in a contract evidencing a transaction involving commerce, federal law [the FAA] controls") (internal quotation omitted); *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 724 (4th Cir. 1990) (finding that the FAA preempted state statute that allowed *negotiable* arbitration provisions because the statute prohibited the *nonnegotiable* arbitration provisions that were at issue); *Safety Nat'l Cas. Co. v. Cinergy Corp.*, 829 N.E.2d 986, 1008 n.13 (Ind. Ct. App. 2005) (recognizing that FAA preempts state statutes precluding binding arbitration); *Abela v. Gen. Motors Corp.*, 669 N.W.2d 271, 278 (Mich. Ct. App. 2003) ("the FAA surmounts any state law, to the extent that that law prohibits a binding arbitration agreement").[5]

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[5] *Kruger Clinic* illustrates the unavoidable conflict between the FAA and current RCW 64.34.100. Although the *Kruger* Court found the FAA inapplicable in that case on grounds wholly irrelevant to this matter, the *Kruger* Court held that a Washington statute and regulation similar to current RCW 64.34.100 and 64.34.030 rendered the parties' arbitration agreements invalid and unenforceable. 157 Wn.2d at 306. Like the Associations' characterization of the WCA, the statute and regulation at issue in *Kruger* allow for *non-binding* arbitration but prohibit "any *binding* form of alternative dispute resolution." *Id.* at 299 (emphasis in original). The *Kruger* Court therefore held that the parties' agreements for *binding* arbitration were invalid and unenforceable. *Id.* at 303-06. Tellingly, the Court took a lenient view of what constitutes binding arbitration prohibited by the statute and regulation; the Court reached its holding even though some of the arbitration agreements at issue *allowed for limited judicial review after arbitration.* The Court found that the limited judicial review fell short of constituting the "judicial remedies" preserved by the statute and regulation. *Id.* Accordingly, if the current WCA applied to the Satomi Lawsuit and the Blakeley Lawsuit (which it does not), then, to the extent the current WCA prohibits *binding* arbitration of WCA claims, the WCA would render invalid and unenforceable the agreements for *binding* arbitration at issue in the Satomi Lawsuit and the Blakeley Lawsuit — clearly in conflict with the FAA's mandate that "[a] written provision ... to settle by arbitration ... or an agreement in writing to submit to arbitration ... ***shall be valid, irrevocable, and enforceable*** ...." 9 U.S.C. § 2 (emphasis added). Indeed, Respondents concede that state statutes "are preempted under the conflict preemption doctrine" if the statutes "invalidate contractual arbitration clauses." Respondent's Supplemental Brief at 9 n.30.

Finally, the Satomi Owners Association's tangential suggestion that if the FAA applies, this Court should "remand for determination of the enforceability of the arbitration clauses and the documents containing them" is erroneous. Respondent's Supplemental Brief at 1 n.5 In *Satomi Owners Ass'n v. Satomi, LLC*, the Court specifically held that the arbitration agreements are enforceable against the Satomi Owners Association and that the Association's non-WCA claims are arbitrable. 139 Wn. App. at 179-81, 190. The Satomi Owners Association appropriately concedes that the enforceability of the arbitration agreements is "beyond the scope" of this Court's review. Respondent's Supplemental Brief at 1-2, 11-12 n.36. The enforceability of the arbitration agreements is therefore settled, and remand for yet another determination of their enforceability would be improper.

RESPECTFULLY SUBMITTED this 26th day of November, 2008.

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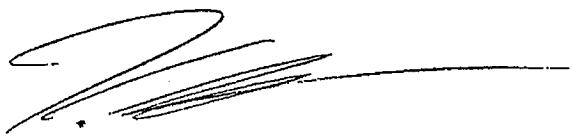

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986 F.2d 1418
986 F.2d 1418, 1993 WL 58742 (C.A.5 (Tex.))
**(Not Selected for publication in the Federal Reporter)**
**(Cite as: 986 F.2d 1418, 1993 WL 58742 (C.A.5 (Tex.)))**



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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fifth Circuit Rules 28.7, 47.5.3, 47.5.4. (Find CTA5 Rule 28 and Find CTA5 Rule 47)

United States Court of Appeals, Fifth Circuit.

CIGNA INSURANCE COMPANY, Plaintiff-Appellee,
v.
Virgil R. HUDDLESTON, Defendant-Appellant,
and
Law Offices of Van Shaw, Appellant.

**No. 92-1252.**

Feb. 16, 1993.

Appeal from the United States District Court for the Northern District of Texas (CA3-91-2389 R).

Before KING, JOHNSON and DUHÉ, Circuit Judges.

PER CURIAM.[FN*]

> FN* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, we have determined that this opinion should not be published.

*1 CIGNA Insurance Company (CIGNA) brought this action pursuant to section 9 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-14, to confirm an arbitration award in its favor and against Virgil R. Huddleston. The district court, determining that (1) the home owner's insurance policy under which Huddleston filed his claim with CIGNA provides for binding arbitration, and (2) Huddleston is barred from challenging the validity of the award pursuant to the three-month limitation period provided under 9 U.S.C. § 12, confirmed the arbitration award. Moreover, as a sanction for their bad-faith refusal to be bound by the arbitration award, the district court sanctioned Huddleston and his attorneys, the Law Offices of Van Shaw (together "defendants"), by awarding CIGNA attorney's fees in the amount of $7,182.50. Defendants now appeal from the district court's confirmation of the arbitration award and its award of sanctions in favor of CIGNA. Finding no error, we affirm.

## I. BACKGROUND

In February 1990, more than nine years and ten months after purchasing his home, Virgil R. Huddleston filed a claim with CIGNA Insurance Company (CIGNA) under a home owner's insurance policy issued by CIGNA's predecessor, INA Underwriter's Insurance Company. Huddleston claimed that his home was defective, and that he was entitled to recover the cost of repairing the defects under the policy. On his claim form, Huddleston described the nature of the defects as follows:

> Garage is leaning. Where garage joins with the rest of the house on the back, the bricks have cracked from the top to bottom of the wall. The crack is at least a quarter inch wide. A spirit level placed on the front garage wall next to Pavilion Street is about one bobble width off from being vertical. In the past two years the frame around the garage door next to the front entrance has pulled away from the house. The separation is over one quarter inch wide at the top of the door.

In a letter to Huddleston dated March 1990, CIGNA denied Huddleston's claim. CIGNA explained that, based on its inspection of Huddleston's

home, the damages claimed do "not constitute a Major Construction Defect" as required by the policy. CIGNA further informed Huddleston that he had the right to request an arbitration if he disagreed with its determination. Huddleston exercised his right to arbitration under the terms of the home owner's policy. Following an arbitration hearing at Huddleston's home, during which the arbitrator personally inspected the property, the arbitrator denied Huddleston's claim. He determined that the problems described by Huddleston do not constitute a "major construction defect."

CIGNA initiated this action by filing an application with the federal district court to confirm the arbitration award pursuant to section 9 of the FAA.[FN1] Huddleston opposed CIGNA's application for confirmation, and he asked the district court to postpone considering it for 60 days so that he could conduct extensive discovery. Huddleston also filed a counter application to vacate the arbitration award.

> FN1. In a separate action, Huddleston filed a complaint against CIGNA in Texas state court, alleging that CIGNA (1) wrongfully denied his insurance claim and (2) coerced and defrauded him into submitting his claim to arbitration. Huddleston sought recovery under the Texas Deceptive Trade Practice Act, as well as under common law theories. CIGNA removed the action to federal court, where it is still pending.

*2 On November 28, 1991, without conducting a hearing, the district court issued its decision on CIGNA's confirmation application. The district court concluded that the home owner's insurance policy under which Huddleston filed his claim provides for binding arbitration. Alternatively, the district court found that, by submitting his claim to arbitration, Huddleston had waived any challenges to the claim's arbitrability. The district court also determined that, because Huddleston did not seek to vacate, modify, or correct the arbitration award in a timely fashion, he was barred from challenging the validity of that award. Accordingly, the district court granted CIGNA's confirmation application and awarded CIGNA attorney's fees and costs.

After the district court issued a memorandum ruling, but before it entered a judgment, Huddleston moved for a new trial, challenging both the confirmation of the arbitration award and the imposition of attorney's fees.[FN2]The district court denied Huddleston's motion for a new trial on December 13, 1991, and it entered an order fixing the amount of fees awarded to CIGNA at $10,595 on December 18, 1991. The court ordered Huddleston to pay one-third of the fees and ordered his attorneys to pay the remaining two-thirds. Defendants subsequently filed motions for reconsideration, and, on February 19, 1992, the district court reduced the total amount of fees awarded to CIGNA by $3,500 and allowed Huddleston's attorneys to pay the entire amount. In all other respects, however, the court denied defendants' motion for reconsideration of the attorney's fees award.

> FN2. Huddleston filed a motion for new trial on the confirmation award on December 6, 1991, and, along with his attorneys, supplemented that motion on December 10 to also challenge the court's decision to award attorney's fees.

On March 19, 1992, defendants filed a notice of appeal from (1) the district court's November 28, 1991 decision confirming the arbitration award in favor of CIGNA and (2) the district court's February 19, 1992 order requiring them to pay CIGNA's attorney's fees. CIGNA then filed a motion to dismiss defendants' appeal under Rule 4 of the Federal Rules of Appellate Procedure on the grounds that defendants' appeal was untimely. On April 2, 1992, the district court issued an order stating that, in the name of judicial economy, it had instructed defendants not to appeal from its November 28, 1991 order until it had ruled on all subsequent motions, including defendants' motion for reconsideration of the attorney's fees award. The order also states that the court expressly retained jurisdiction over the

entire case until issuing its final ruling, which was its February 19 ruling.

## II. DISCUSSION

This appeal has given rise to the following issues: (a) Does this court have jurisdiction to consider Huddleston's appeal from the district court's confirmation of the arbitration award?; (b) Did the district court err in applying the FAA to Cigna's application for confirmation of the arbitration award?; (c) Did the district court err in refusing to grant a hearing before ruling on CIGNA's application for confirmation of the arbitration award?; (d) Did the district court err in confirming the arbitration award?; and (e) Did the district court err in awarding attorney's fees?

### A. Jurisdiction

*3 We begin by addressing Cigna's challenge to our jurisdiction to consider Huddleston's appeal. Specifically, Cigna contends that Huddleston failed to file a timely notice of appeal from the district court's denial of their motion for a new trial. We disagree.

#### 1. *Proceedings*

On November 28, 1991, the district court issued a Memorandum Order, Opinion, and Judgment on Plaintiff's Application for Confirmation of Arbitration, in which it (1) confirmed the arbitration award in CIGNA's favor and (2) awarded CIGNA attorney's fees, the amount of which was to be determined later. Although the last several paragraphs of this document purport to constitute a final judgment, the district court did not satisfy the requirement under Rule 58 of the Federal Rules of Civil Procedure that "[e]very judgment shall be set forth on a separate document."*See Whitaker v. City of Houston,* 963 F.2d 831, 833 (5th Cir.1992) ("Until set forth on a separate document in compliance with Rule 58, a statement tacked on at the end of an opinion is not a judgment ."). Generally, the separate-document rule is "mechanically applied," [FN3] for, according to Rule 58, "[a] judgment is effective only when so set forth and when entered as provided in Rule 79(a)."FED. R. CIV. P. 58; *see also*FED. R.APP. P. 4(a)(7) ("A judgment or order is entered within the meaning of Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.").

> FN3.*See Bankers Trust Co. v. Mallis,* 435 U.S. 381, 386, 98 S.Ct. 1117, 1121 (1978), *citing United States v. Indrelunas,* 411 U .S. 216, 221-22, 93 S.Ct. 1562, 1564-65 (1973).

Nevertheless, Huddleston filed a timely [FN4] motion for new trial on December 6, 1991, and then defendants supplemented that motion on December 10, 1991 with a challenge to the court's award of attorney's fees. Defendants' motion for a new trial made the fact that the district court never entered a judgment pursuant to Rule 58 inconsequential, for (1) the November 28 Memorandum Order, Opinion, and Judgment was clearly final and dispositive of the case,[FN5] and (2) Rule 4(a)(4) of the Federal Rules of Appellate Procedure provides that:

> FN4. Pursuant to Rule 59(b) of the Federal Rules of Appellate Procedure, "[a] motion for new trial shall be served no later than 10 days after the entry of the judgment."Nevertheless, the entry of a judgment is not a prerequisite for moving for a new trial, for Rule 59(a) explicitly provides that, "[o]n a motion for a new trial in an action tried without a jury, the court may open the judgment *if one has been entered...* and direct the entry of a new judgment."FED. R. CIV. P. 59(a) (emphasis added).

> FN5. In *Bankers Trust Co v. Mallis,* 435 U.S. 381, 383, 98 S.Ct. 1117, 1119 (1978), the Supreme Court considered whether a district court decision may constitute a

> "final decision" for purposes of § 1291 if not set forth on a document separate from the opinion. The Court determined that the answer is yes, holding that:
>
> > The need for certainty as to the timeliness of an appeal, however, should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered .... The same principles of common sense interpretation that led the Court ... to conclude that the technical requirements for a notice of appeal were not mandatory where the notice "did not mislead or prejudice" the appellee demonstrate that parties to an appeal may waive the separate-judgment requirement of Rule 58.
> >
> > *Id.* at 386-87, 98 S.Ct. at 1121 (citation omitted).
>
> [i]f a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party ... under Rule 59 for a new trial, *the time for appeal for all parties shall run from the entry of the order denying a new trial....* A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above.

FED. R.APP. P. 4(a)(4) (emphasis added); *see Osterneck v. Ernst & Whinney,* 489 U.S. 169, 109 S.Ct. 987, 990 (1989) ("Together, these rules[-Rule 59 and Rule 4(a)(4)-]work to implement the finality requirement of 28 U.S.C. § 1291 by preventing the filing of an effective notice of appeal until the District Court has had an opportunity to dispose of all motions that seek to amend or alter what otherwise might appear to be a final judgment.").

*4 The district court signed an order denying Huddleston's motion for a new trial on December 13, 1991. Under the plain language of Rule 4(a)(4), Huddleston had *thirty days from December 13, 1991*-the date the separate-document order denying his motion for new trial and reconsideration was entered-to appeal from the district court's decision granting CIGNA's application to confirm the arbitration award. Specifically, Rule 4(a)(4) provides that "[a] notice of appeal filed before the disposition of [the motion for a new trial] shall have no effect. A new notice of appeal must be filed within [thirty days] measured from the entry of the order disposing of the motion [for a new trial]."FED. R.APP. P. 4(a)(4) (emphasis added); *see also*FED R.APP. P. 4(a)(1) ("the notice of appeal ... shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from"). However, upon entry of this order, the district court informed Huddleston ex parte that it was retaining jurisdiction of the entire case until ruling on all subsequent motions, and the court instructed him not to file an appeal until that time. The court entered its last order-an order reducing the total amount of fees awarded to CIGNA by $3,500 and allowing Huddleston's attorneys to pay the entire amount-on February 19, 1992. Defendants filed a notice of appeal on March 19, 1992-twenty-eight days later-appealing from both the court's February 19 order and the Memorandum Order, Opinion, and Judgment it entered on November 28, 1991.

***2. Cigna's Challenge***

According to Cigna,

> the district court's November 28, 1991 decision on the merits became final and appealable on December 20, 1991, the date the district court's order denying Huddleston's motions for new trial and reconsideration was entered on the docket, notwithstanding that there remained for adjudication a request for attorney's fees attributable to the case. Huddleston did not file his notice of appeal until March 19, 1992-90 days later.

To support this position, Cigna relies upon the Su-

preme Court's holding in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202-3, 108 S.Ct. 1717, 1722 (1988). In that case, the Court held that the Tenth Circuit was without jurisdiction to consider an appeal where the district court denied Budinich's motion for a new trial on May 14, 1984 but did not dispose of his claim for attorney's fees until August 1, 1984; Budinich filed his notice of appeal on August 29, 1984. In holding that the denial of Budinich's motion for a new trial was a final, appealable order, the Court stated:

> A question remaining to be decided after an order ending litigation on the merits does not prevent finality if its resolution will not alter the order or moot or revise decisions embodied in the order ....*As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees pertain.*Such an award does not remedy the injury giving rise to the action, and indeed is often available to the party defending against the ac- tion.

***5** *Id.* at 199-200, 108 S.Ct. at 1720 (emphasis added).

There is a major distinction between *Budinich* and the case at issue: In the case before us, upon denying defendants' motion for a new trial, the district court stated to Huddleston that it was retaining jurisdiction, and it instructed him to postpone his appeal of the court's November 28, 1991 order until the entry of a final order on February 19, 1992. The court confirmed this instruction in a post hoc fashion by entering an order on April 2, 1992, in which it stated:

> [defendants'] appeal, filed March 19, 1992-from the Court's Memorandum Order, Opinion, and Judgment of Plaintiff's Application for Confirmation of Arbitration, dated November 28, 1991-is timely. For the purpose of judicial economy, this Court instructed [Huddleston] to postpone [his] appeal of the November 28, 1991 Order until this Court had ruled on all subsequent motions in this case. This Court expressly retained jurisdiction over the case until the issuance of the Court's last order, dated February 19, 1992, amending the award of attorney's fees. The time period for the appeal deadline for the entire case did not begin to run until February 19, 1992.

Cigna challenges the legitimacy of this postponement, asserting that "the court's 'order' [stating that defendants' appeal is timely] is a legal nullity."According to Cigna, the district court's discretion to extend time for filing an appeal from its final decision on the merits is limited to that provided under Rule 4(a)(5) of the Federal Rules of Appellate Procedure.

It is indisputable-and troublesome-that the district court did not extend Huddleston's time to appeal in compliance with Rule 4(a) (5).[FN6] Moreover, rather than entering a written judgment explicitly labelled "interlocutory" when denying defendants' motion for a new trial, the district court acted orally and ex parte .[FN7]This failure to enter such a written judgment makes the case at issue factually distinguishable from *Harbor Insurance Co. v. Trammell Crow Co.*, 854 F.2d 94 (5th Cir.1988), *cert. denied*, 489 U.S. 1054, 109 S.Ct. 1315 (1989), where the district court entered a written order expressly labelled "interlocutory." In light of this written order, we rejected a contention-similar to Cigna's-that we did not have jurisdiction to consider an appeal. We stated that,

> FN6.Rule 4(a)(5) provides that:
>
> > The district court, [1] upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal [2] upon motion [3] filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a).... [4] No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.
>
> As stated by Cigna, (1) Huddleston nev-

> er filed any motion for an extension of time under Rule 4(a)(5), (2) the district court's instruction to postpone appealing was based upon its perceptions of judicial economy rather than excusable neglect or good cause, and (3) defendants' notice of appeal was filed well beyond the thirty-day extension authorized under Rule 4(a)(5).
>
> FN7. We note that, under Rule 4(a)(5) of the Federal Rules of Appellate Procedure, a motion for an extension of time may be ex parte.

while the district court did dispose of the merits [by entering a judgment], it was labeled "interlocutory" and specifically provided that "this Judgment is an Interlocutory Judgment only."We find nothing in the Supreme Court's writing [in *Budinich* ] to remove the district court's control of the case and transform its interlocutory order into a final judgment when the latter court chooses to render its final judgment after resolving the attorney's fee issue.

854 F.2d at 97.

We must, therefore, focus on the facts before us-namely, the actions of the district court and the reasonableness of the defendants' reliance upon those actions-and consider whether they constitute "unique circumstances" justifying an exception to the absolute filing deadline of Rule 4 of the Federal Rules of Appellate Procedure. The Supreme Court recognized this unique circumstances exception in *Thompson v. INS,* 375 U.S. 384, 386-87, 84 S.Ct. 397, 398-99 (1963). The appellant in *Thompson, relying upon the district court's statement* that his motion for new trial filed 12 days after the judgment was entered had been filed "in ample time[,]" did not file a timely notice of appeal from the district court's original judgment. *Id.* at 385, 84 S.Ct. at 397. Rather, he filed a timely notice of appeal from the district court's denial of his motion for a new trial. Although the court of appeals dismissed this appeal on the grounds that appellant's motion for new trial was untimely, the Supreme Court reversed. *Id.* at 387, 84 S.Ct. at 399. In short, "[b]ecause petitioner had filed his notice of appeal *in reliance on the specific statement of the District Court* that his motion for new trial was timely, [the Court] felt that *fairness* required that the Court of Appeals excuse his untimely appeal." *Osterneck v. Ernst & Whinney,* 489 U.S. 169, 109 S.Ct. 987, 992-93 (1989) (interpreting *Thompson* ) (emphasis added).[FN8] Later that same term, the Court reiterated its *Thompson* holding in *Wolfsohn v. Hankin,* 376 U.S. 203, 84 S.Ct. 699 (1964).[FN9] In that case, the plaintiff relied upon a signed order granting an extension of time for filing a motion for rehearing. The Court reversed the court of appeals, which had held that, because the motion for rehearing was untimely, the time for taking an appeal had not been tolled. *See*321 F.2d at 394.

> FN8. In reaching this holding in *Thompson,* the Court relied upon its holding in *Harris Truck Lines v. Cherry Meat Packers,* 371 U.S. 215, 217, 83 S.Ct. 283, 285 (1962), where the Court stated:
>
> > In view of the obvious great hardship to a party who relies upon the trial judge's finding of "excusable neglect" prior to the expiration of the 30-day period and then suffers reversal of the finding, it should be given great deference by the reviewing court. Whatever the proper result as an initial matter on the facts here, the record contains a showing of unique circumstances sufficient that the Court of Appeals ought not to have disturbed the motion judge's ruling.
>
> FN9. The Supreme Court's memorandum opinion in *Wolfsohn* simply reverses the court of appeals' decision. The facts and procedural history of *Wolfsohn* are found in the court of appeals' opinion, 321 F.2d 393, 394 (D.C.Cir.1963).

*6 More recently, the Court refused to apply the unique circumstances exception where a notice of appeal was rendered ineffective by a Rule 59(e) motion for prejudgment interest. *See Osterneck,* 489 U.S. at ----, 109 S.Ct. at 992-93. However, in *Osterneck,* the district court *did not make an affirmative representation* to defendants that their appeal was timely filed. *Id.* at ____, 109 S.Ct. at 993. Accordingly, the Court distinguished *Thompson* by limiting its application of the unique circumstances doctrine in that case to the *Thompson* facts, holding that "*Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done."*Id.* Other Circuits have interpreted *Osterneck,* and, "[i]n the wake of *Osterneck,* [they] generally have insisted on the requirement 'that the [unique circumstances] doctrine applies only *where a court has affirmatively assured a party that its appeal will be timely.*' " *United States v. Heller,* 957 F.2d 26, 29 (1st Cir.1992) (limiting applicability of the doctrine to judges by holding that reliance on the statements or actions of other court employees cannot trigger the doctrine) (emphasis added), *quoting In re Slimick,* 928 F.2d 304, 310 (9th Cir.1990) (holding that ambiguous or implicitly misleading conduct by courts does not release litigants from their appeal deadlines); *see also Kraus v. Consolidated Rail Corp.,* 899 F.2d 1360, 1364 (3rd Cir.1990) ( "Although the scope of the 'unique circumstances' rule remains murky following the Court's more recent emphasis on the mandatory nature of jurisdictional issues and the need for strict compliance with the time limitations imposed by the Rules, we are not free to sound the death knell for a rule enunciated by the Supreme Court and never retracted by it."), *aff'd,* 947 F.2d 935 (3rd Cir.1991); *Green v. Bisby,* 869 F.2d 1070, 1072 (7th Cir.1989) (holding that the mere entry of a minute order is not an act of affirmative representation by a judicial officer contemplated by *Osterneck* ).

We interpreted *Osterneck* in *Prudential-Bache Securities, Inc. v. Fitch,* 966 F.2d 981, 985 (5th Cir.1992), where, although the district court did not tell petitioners that their belated notice of appeal was timely, petitioners relied upon written notice provided by the clerk's office that the court's order had been entered on a given date. Because the date of entry was actually eleven days later, petitioners' notice of appeal was premature pursuant to Rule 4(a)(4) of the Federal Rules of Appellate Procedure, and they did not discover this until the time to file a second notice of appeal had lapsed. Interpreting *Osterneck* to indicate "that the [unique circumstances] rule applies only where the district court makes an 'affirmative representation' that a party's notice of appeal was proper[,]" we held:

> *7 The clerk's notice sent to the Fitches officially notified them of the date the critical order was entered. This is the kind of 'affirmative representation' or 'specific assurance' that triggers the special circumstances rule.

*Id.* at 985.We then went on to state that "[p]arties may not rely on the clerk to send them notice[,] and absence of notice is no excuse for not filing a timely notice of appeal. However, *parties should be able to rely on the notice they do receive."Id* at 985-86 (emphasis added and citations omitted).[FN10]

> FN10. Similarly, in a pre-*Osterneck* case decided by this court, *Chipser v. Kohlmeyer & Co.,* 600 F.2d 1061, 1063 (5th Cir.1970), we found the presence of unique circumstances where the district court entered an ambiguous order. That order prompted an inquiry by counsel as to when a new trial date would be set, and "[t]he confusion was compounded by the judge's response, which implied that a new trial had been granted without qualification."*Id.* Relying upon *Thompson,* we held that:
>
> > While counsel's initial misapprehension of the import of the ... order might not alone rise to the level of excusable neg-

> lect, we cannot say that an extension of time is unwarranted when counsel is misled by good faith reliance on a statement of the district court. The circumstances of this case are sufficiently unique to justify a finding of excusable neglect.
>
> *Id.* at 1063 (internal citations omitted).

In the case before us, the district court, well before defendants' time to appeal under Rule 4(a)(4) had lapsed,[FN11] made an affirmative statement as to when defendants' appeal would be timely. More precisely, because defendants had inundated the district court with motions, the court, through an ex parte instruction, stopped them from appealing until it had issued its last order. Defendants complied with that instruction; we have no reason to believe that, had the district court complied with the Federal Rules of Civil and Appellate Procedure in issuing it, defendants' notice of appeal would have been untimely filed. Although we do not condone the district court's failure to comply with the Federal Rules of Procedure, defendants' zeal for filing motions does not warrant their being mislead by the district court into losing their right to appeal. Especially in light of the fact that it was within the court's discretion to enter an interlocutory order denying defendants' motion for new trial,[FN12] we find that defendants' reliance upon and compliance with the district court's explicit instruction was objectively reasonable. *See Moses,* 951 F.2d at 20 ("At bottom, the inquiry anent the scope of the [unique circumstances] exception must focus upon whether the appellant's professed reliance on the actions of the district court was objectively reasonable."); *see also Chipser,* 600 F.2d at 1063 (a pre-*Osterneck* case finding unique circumstances where counsel was misled by *good faith reliance* on a statement by the district court). To hold otherwise would result in the kind of inequity-namely, the loss of an opportunity to appeal due to court-created uncertainty as to when that appeal was appropriate-the separate-document requirement was engineered to avoid.[FN13]Accordingly, we reach the merits of defendants' appeal .[FN14]

> FN11. The First Circuit has recognized that, when evaluating a unique circumstances claim, courts must consider whether the judicial action in question occurred before the petitioner's time for filing a notice of appeal had lapsed:
>
> > Courts applying the unique circumstances exception will permit an appellant to maintain an otherwise untimely appeal in unique circumstances in which the appellant reasonably and in good faith relied upon judicial action that indicated to the appellant that his assertion of his right to appeal would be timely, so long as the judicial action occurred prior to the expiration of the official time period *such that the appellant could have given timely notice had he not been lulled into inactivity.*
> >
> > *Feinstein v. Moses,* 951 F.2d 16, 20 (1st Cir.1991) (emphasis in original and internal quotations omitted).
>
> FN12.*See Harbor Insurance,* 854 F.2d at 97 ("We find nothing in the Supreme Court's writing to remove the district court's control of the case and transform its interlocutory order into a final judgment when the latter court chooses to render its final judgment after resolving the attorney's fees issue.").
>
> FN13. As stated by the Supreme Court in *Bankers Trust,*
>
> > The separate-document requirement was thus intended to avoid the inequities that were inherent when a party appealed from a document or docket entry that appeared to be a final judgment of the district court[,] only to have the appellate

> court announce later that an earlier document or entry had been the judgment and dismiss the appeal as untimely.
>
> 435 U.S. at 385, 98 S.Ct. at 1120.
>
> FN14. We note that, as discussed *supra* at Part II.A.1, no separate-document judgment was entered before defendants moved for a new trial, and it is not clear that the district court's denial of defendants' motion for a new trial, delivered with instructions and statements to the contrary, constitutes a final judgment. Nevertheless, "nothing but delay would flow from [our dismissing this appeal]. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose ...." *See Bankers Trust,* 435 U.S. at 385, 98 S.Ct. at 1120.

**B. Application of the FAA**

According to Huddleston, "application of the [FAA] to the case at hand was clearly erroneous because[,] if an arbitration act did actually apply, it should have been the Texas General Arbitration Act."To support this proposition, Huddleston points to language in a Limited Warranty Agreement-an agreement between him and the builder of his home warranting that "the home will be free from defects due to noncompliance with the Approved Standards and from major construction defects" for a period of two years-which states that "[t]his agreement is to be covered by and construed in accordance with the laws of the state in which the home is located."Citing *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 109 S.Ct. 1248 (1989), for authority, Huddleston argues that this language requires the application of Texas's arbitration statute. *See*TEX.REV.CIV. STAT. ANN. arts. 224-49 (Vernon's 1973 & Supp.1993).

*8 Huddleston's motive in arguing for the applicability of the Texas General Arbitration Act is his failure to comply with the FAA's requirement that a motion to vacate, modify, or correct an arbitration award "be served upon the adverse party or his attorney within three months *after the award is filed or delivered."*9 U.S.C. § 12 (emphasis added); *see infra* Part II.D.2. Under the Texas General Arbitration Act, a motion to vacate or modify an arbitration award-if predicated on corruption, fraud, or undue means-need only be made within three months *after the corruption, fraud, or undue means has been discovered. See*TEX.REV.CIV. STAT. ANN. art 237 (Vernon's 1973). According to Huddleston, the Supreme Court's decision in *Volt* requires that the timing of his motion to vacate the arbitration award be governed by the Texas Act and, under that Act, his challenge to the arbitration award is timely.

We begin by recognizing that the Supreme Court's decision in *Volt* does not aid Huddleston in the case before us. In *Volt,* a party to a contract with an arbitration provision filed suit in state court seeking to compel arbitration of the dispute; the other party, pursuant to a state arbitration statute, moved to stay arbitration pending the outcome of related litigation involving third parties. 489 U.S. at ---, 109 S.Ct. at 1251. The state court, interpreting the parties' contract to have incorporated state rules of arbitration, stayed the arbitration pursuant to the state rule. *Id.* at ____, 109 S.Ct. at 1251-52. The Supreme Court upheld this application of the state arbitration rule for two reasons. First, the Supreme Court reasoned that it could not disturb the state court's interpretation of the contract as intending to incorporate state arbitration rules. *Id.* at ____, 109 S.Ct. at 1253. Second, the Supreme Court concluded that the FAA did not preempt the state rule allowing courts to stay an arbitration proceeding. *Id.* at ____, 109 S.Ct. at 1254-56. Specifically, the Court held that:

> There is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to

> arbitrate. Interpreting a choice-of-law clause to make applicable state rules governing the conduct of arbitration-rules which are manifestly designed to encourage resort to the arbitral process-simply does not offend the rule of liberal construction ..., nor does it offend any other policy embodied in the FAA.

*Id.* at ____, 109 S.Ct. at 1254;*see also Flight Systems v. Paul A. Laurence Co.*, 715 F.Supp. 1125, 1127 (D.D.C.1989) (Applying *Volt,* the court held that the Virginia Arbitration Act governs where "[t]he parties contracted under the laws of Virginia, agreed to arbitration under the laws of Virginia, and the applicable Virginia law does not directly conflict with the goals of the FAA.").

*9 In the case before us, the district court did not find that the parties intended to incorporate state arbitration rules. Huddleston's argument to the contrary-an argument premised on an erroneous conclusion that choice of law language in a Limited Warranty Agreement between him and its builder covering the first two years of ownership controls the ten-year Home Warranty Insurance Policy (the "Master Policy") between him and Cigna-is without merit. Huddleston did not bring his claim until more than nine years and ten months after purchasing his home, and the Master Policy-the policy under which Huddleston filed his claim-expressly provides that "[n]o claims will be paid by the Company prior to completion of conciliation or arbitration *in accordance with the procedures set forth by [Home Owners Warranty Corporation].*"[FN15] Moreover, the Master Policy was assigned to Huddleston by a Certificate of Participation, which provides that, for claims arising *during years three through ten,* any arbitration "*shall* be conducted in accordance with the Expedited Home Construction Arbitration Rules of *the American Arbitration Association* or through other arbitration rules and procedures adopted by Local Council and approved by National Council as substantially equivalent."[FN16]

FN15. Emphasis has been added.

FN16. Emphasis has been added.

Finally, we recognize that, in the absence of explicit incorporation of Texas arbitration rules, the Texas General Arbitration Act is preempted to the extent that it conflicts with the three-month requirement for filing motions to vacate an arbitration award under section 12 of the FAA. *See Cohen v. Wedbush, Noble, Cooke, Inc.*, 841 F.2d 282, 285 (9th Cir.1988) (availability and validity of defenses against arbitration are governed by federal standards). Specifically, the FAA provides that:

> [a] written provision in any ... contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. Under section 2, when there is a binding arbitration provision in a "contract evidencing a transaction involving commerce [,]" federal law controls. *See Hartford Lloyd's Ins. Co. v. Teachworth,* 898 F.2d 1058, 1061 (5th Cir.1990) ("The sine qua non of the FAA's applicability to a particular dispute is an agreement to arbitrate the dispute in a contract which evidences a transaction in interstate commerce."); *Tullis v. Kohlmeyer & Co.*, 551 F.2d 632, 638 n. 8 (5th Cir.1977) (holding that securities act claims are not precluded from arbitration). While the FAA requires an agreement to arbitrate, it does not require that the parties expressly agree that federal law will govern its enforceability.

In sum, once the district court found that the Master Policy and related Certificate of Participation (1) do not incorporate Texas' rules of arbitration, (2) make express reference to the federal rules, (3) contain an arbitration provision, and (4) constitutes a transaction involving interstate commerce, application of the FAA was not only appropriate, it was mandatory. Accordingly, we find that the district court did not err by applying the FAA to the case at issue.

**C. The District Court's Refusal to Conduct a Hearing on the Arbitrator's Impartiality**

***10** Huddleston also contends that the district court erred in refusing to hold a hearing on the issue of the arbitrator's impartiality. Huddleston cites this court's decision in *Legion Insurance Co. v. Insurance General Agency, Inc.*, 822 F.2d 541 (5th Cir.1987), and the Second Circuit's decision in *Sanko Steamship Co. v. Cook Industries, Inc.*, 495 F.2d 1260 (2d Cir.1973), to support this contention. As discussed below, neither of these decisions governs the case before us.

In *Legion*, this court recognized that "[a]rbitration proceedings are summary in nature to effectuate the national policy favoring arbitration." 822 F.2d at 543. We also stated that such proceedings require an "expeditious and summary hearing, with only restricted inquiry into factual issues."*Id., quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 22, 103 S.Ct. 927, 940 (1983). We recognized, however, citing *Sanko Steamship*, that "some motions challenging arbitration awards may require evidentiary hearings outside the scope of the pleadings and arbitration record." 822 F.2d at 542. In particular, we stated that matters such as the "misconduct or bias of the arbitrators cannot be gauged on the face of the arbitral record alone[,]" but we then held that "[n]o such case is here presented." *Id.* at 543.

Had the district court based its decision to confirm the arbitration award on a finding that the arbitrator was not biased, then Huddleston's argument might have some merit. *See Sanko Steamship*, 495 F.2d at 1265 (reversing order confirming arbitration award where question of arbitrator's impartiality was decided on an incomplete record). However, the district court did not base its ruling on any such finding. Instead, the district court relied upon two other findings-that Huddleston (1) waived any possible defenses to arbitrability, and (2) failed to timely attempt to vacate, modify, or correct the arbitration award pursuant to 9 U.S.C. § 12. Therefore, as in *Legion*, this case "posed no factual issues that required the court, pursuant to the Arbitration Act, to delve beyond the documentary record of the arbitration and the award rendered." 822 F.2d at 543. Accordingly, we find that Huddleston's contention that the district court erred in failing to hold a hearing on the arbitrator's impartiality is without merit.

**D. Confirmation of the Arbitration Award**

Huddleston raises three challenges to the district court's confirmation ruling. *First*, he argues that the arbitration provision in the insurance agreements was not meant to be binding. *Second*, he contends that the arbitration award was procured by corruption, fraud, and undue means, and that the arbitrator was biased. And *third*, he alleges that CIGNA was not a party to the arbitration award.

***1. Binding Nature of The Arbitration Provision***

Huddleston contends that the district court lacked jurisdiction to confirm the arbitration award because the insurance documents-namely, the Master Policy and the Certificate of Participation-do not provide for entry of judgment on the award. This contention is without merit. As CIGNA correctly points out, an arbitration agreement need not expressly provide for judicial confirmation of the award. Where, as here, the contract provides that arbitration shall be "final and binding," [FN17] courts have judicial authority to confirm the award. *See Milwaukee Typo. Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 389-90 (7th Cir.) ("Several courts have found such ["final and binding"] language sufficient to imply consent to the entry of judgment on an arbitration award."), *cert. denied*, 454 U.S. 838, 102 S.Ct. 144 (1981). In addition, "an agreement to arbitrate is a contract and must be interpreted like any other contract."*See Rainwater v. Nat'l Home Ins. Co.*, 944 F.2d 190, 192 (4th Cir.1991). Accordingly, because the parties incorporated the rules of the American Arbitration Association into their agreement (*see supra* Part II.B), we may infer an intent to provide

for judicial confirmation of the award. *Id.* at 192-94 (reference to American Arbitration Association rules and regulations in home owners insurance policy demonstrated parties' intent that arbitration be judicially enforceable).[FN18] We conclude, therefore, that the parties agreed that the outcome of their arbitration should be final and binding, and that the district court did not err in ruling to confirm the arbitration award.

> FN17. The Certificate of Participation issued to Huddleston provides that the "decision of the arbitrator shall be final and binding upon the Purchaser, Insurer, Local Council, and National Council."

> FN18. In *Rainwater,* the Fourth Circuit state that "all parties are on notice ... that resort to AAA arbitration will be deemed both binding and subject to entry of judgment unless the parties expressly stipulate to the contrary." 944 F.2d at 194.

**2. *Fraud and Bias Contentions***

***11** Huddleston also challenges the district court's refusal to consider his defenses to confirmation of the arbitration award on the grounds that, pursuant to 9 U.S.C. § 12,[FN19] he has raised these defenses in an untimely fashion. Specifically, Huddleston asserts that (1) the arbitration award was procured by fraud, and the arbitrator was biased against him, and (2) the three-month statute of limitations under the FAA is inapplicable because he has proven fraudulent concealment. We disagree.

> FN19. This provision provides, in relevant part, that "[n]otice of a motion to vacate, modify, or correct an award must be served on the adverse party or his attorney *within three months after the award is filed or delivered.*"9 U.S.C. § 12 (emphasis added).

Although a party is allowed to assert the defenses advanced by Huddleston (defenses that are also grounds for vacating an arbitration award under 9 U.S.C. § 10), such defenses may only be asserted within the three-month time period provided for in 9 U.S.C. § 12. Huddleston raised his defenses in response to Cigna's motion to confirm the arbitration award and at a time beyond the three-month period of limitation, and

> the failure of a party to move to vacate an arbitral award within the three-month limitations period prescribed by section 12 of the United States Arbitration Act bars him from raising the alleged invalidity of the award as a defense in opposition to a motion brought under section 9 of the [United States Arbitration Act] to confirm the award.

*Cullen v. Paine, Webber, Jackson & Curtis, Inc.,* 863 F.2d 851, 854 (11th Cir.), *cert. denied,* 490 U.S. 1107, 109 S.Ct. 3159 (1989); *see also Sanders-Midwest, Inc. v. Midwest Pipe Fabricators, Inc.,* 857 F.2d 1235, 1237 (8th Cir.1988) (where a party raised objections to an arbitration award in response to a motion to confirm, holding that "[t]he authorities agree that a party may not assert a defense to a motion to confirm that the party could have raised in a timely motion to vacate, modify, or correct the award"); *Taylor v. Nelson,* 788 F.2d 220, 225 (4th Cir.1986) ("We adopt the rule embraced by the Second Circuit ... that once the three-month period has expired, an attempt to vacate an arbitration award could not be made even in opposition to a later motion to confirm."); [FN20] *Florasynth, Inc. v. Pickholz,* 750 F.2d 171, 175 (2d Cir.1984) ("[U]nder its terms, a party may not raise a motion to vacate, modify, or correct an arbitration award after the three[-]month period has run, even when raised as a defense to a motion to confirm."). In short, despite the tentative authority he cites for support,[FN21] Huddleston's assertion that "affirmative defenses as set forth under § 10 can be brought at any time in response to an action to confirm" is a misstatement of the governing law.

> FN20. The Fourth Circuit also stated that "[a] confirmation proceeding under 9 U.S.C. § 9 is intended to be summary: confirmation can only be denied if an award

has been corrected, vacated, or modified in accordance with the Federal Arbitration Act." *Taylor,* 788 F.2d at 225.

FN21.*See, e.g., Paul Allison, Inc. v. Minikin Storage of Omaha,* 452 F.Supp. 573, 575 (D.Neb.1978).

We also reject Huddleston's contention that, because he alleges fraud and impartiality within the arbitration proceeding, "[i]n addition to the Federal Doctrine of Equitable Tolling or Equitable Estoppel, the statute of limitation which would apply would be that under the state four (4) year statute of limitations under the Texas Civil Practice and Remedies Code, § 16.051."Our decision is based on the fact that there is no "discovery rule" or "equitable tolling" exception to the requirement in section 12 of the FAA that the defenses of fraud or impartiality be asserted within three months from the time that the arbitration award is filed or delivered. *See, e.g., Taylor,* 788 F.2d at 225 ("The existence of any such [due diligence or tolling] exceptions to § 12 is questionable, for they are not implicit in the language of the statute, and cannot be described as common-law exceptions because there was no common-law analogue to enforcement of an arbitration award."); *Pickholz,* 750 F.2d at 175 ("[T]here is no common law exception to the three[-]month limitations period on the motion to vacate."); *see also Sanders-Midwest,* 857 F.2d at 1238 ("The [three-month limitations period] applies to claims challenging the partiality of the arbitrator."). Accordingly, we conclude that Huddleston's defenses to the arbitration award are untimely under 9 U.S.C. § 12, and we affirm the district court's refusal to consider them.

### 3. *Technical Defect in the Arbitration Award*

***12** In his final challenge to the district court's confirmation ruling, Huddleston asserts that the district court erred in confirming the arbitration award because CIGNA was not a party to the arbitration proceeding. This challenge is based on the fact that the arbitration award's caption identifies "CIGNA Property and Casualty Company" as the respondent, while the confirmation of the arbitration award identifies "CIGNA Insurance Company" as the applicant.

Although Huddleston is correct in asserting that the arbitration award technically identifies the wrong party, this technical defect does not render the district court's confirmation of the arbitration award erroneous. It certainly does not require reversal, for "[w]hat was involved was, at most, a mere misnomer that injured no one ...." *United States v. A.H. Fischer Lumber Co.,* 162 F.2d 872, 874 (4th Cir.1947) (quoting 14 C.J. 325 for the proposition that, "[a]s a general rule[,] the misnomer of a corporation ... in a judicial proceeding is immaterial if it appears that it could not have been, or was not, misled"). In the case before us, we conclude that "everyone involved in the action ... knew of and could identify the entity being sued[,]" [FN22] and that the misnomer on the arbitration award "injured no one." *Fischer,* 162 F.2d at 874.

FN22. *Quann v. Whitegate-Edgewater,* 112 F.R.D. 649, 652 n. 4 (D.Mid.1986) (refusing to dismiss lawsuit because of misnomer); *see also Fischer,* 162 F.2d at 874 (Where parties to a proceeding are designated "in such terms that every intelligent person understands who is meant, as is the case here ... courts should not put themselves in the position of failing to recognize what is apparent to everyone else.").

### E. Attorney's Fees

Lastly, Huddleston challenges the district court's February 19, 1992 order sanctioning defendants by awarding CIGNA attorney's fees. In awarding these fees, the district court held that:

The award was based on Defendant's refusal to abide by the arbitrator's award "without justifica-

tion." [FN23]....After further consideration of the cases relied on by Defendants, this Court finds that there is at least some precedent to support some of the arguments they raised in response to Applicant's motion to confirm the arbitrator's award. Therefore, the Court finds that a partial modification of the fee award is warranted.

FN23. *Bell Production Engineers v. Bell Helicopter,* 688 F.2d 997, 999 (5th Cir.1982), *aff'd,* 1653 F.2d 310 (7th Cir.1981).

The court then reduced its earlier award of attorney's fees in the amount of $10,595.00 to $7,182.50.

In *Bell,* we held as follows:

> The district court concluded that the company's refusal to abide by the arbitrator's award was without justification, making judicial enforcement necessary, and that an award of attorney's fees would further the federal labor policy favoring voluntary arbitration. The finding that the company acted *without justification* is not clearly erroneous, and the award was within the discretion which we have imparted to the district court.

688 F.2d at 1000 (emphasis added). Defendants, relying primarily upon a lower court case citing *Bell,* [FN24] interpret our "without justification" holding as an all-or-none proposition. They assert that a challenge to an arbitration award is only sanctionable when *all* precedent is on the side of the other party. Moreover, according to defendants, "[n]either CIGNA nor the District Court have cited any statutory authority for award of the attorney fees.... Had Congress intended attorney fees to be awarded under the FAA, it would have provided for such. It did not."

FN24.*See Shearson, Hayden, Stone, Inc. v. Liang,* 493 F.Supp. 104 (N.D.Ill.1980).

***13** We begin by responding to defendants' contention that the district court had no power to award Cigna attorney's fees under the FAA. Beyond statutory authority to sanction, district courts have the inherent power "to levy sanctions in response to abusive litigation practices."*See Roadway Express, Inc. v. Piper,* 447 U.S. 752, 765, 100 S.Ct. 2455, 2463 (1980) (citation omitted), *superseded by statute on other grounds as recognized in Morris v. Adams-Mills Corp.,* 758 F.2d 1352 (10th Cir.1985). The Court has recently reaffirmed this inherent power to sanction by rejecting an assertion that it is displaced by rules explicitly bestowing the power to sanction upon district courts. *See Chambers v. NASCO, Inc.,* 501 U.S. 32, ----, 111 S.Ct. 2123, 2131-36 (1991). Specifically, the Court stated in *Chambers* that "[t]here is ... nothing in the other sanctioning mechanisms or prior cases interpreting them that warrants a conclusion that a federal court may not, as a matter of law, resort to its inherent power to impose attorney's fees as a sanction for bad-faith conduct." *Id.* at ____, 111 S.Ct. at 2135. This inherent power to award attorney's fees for bad-faith conduct, the Court recognized, "extends to a full range of litigation abuses." *Id.* at ____, 111 S.Ct. at 2134.

As for defendants' interpretation of our *Bell* holding, we find that it is too narrow. Limiting the district court's sanctioning power for bad-faith conduct to instances where *all* precedent is in favor of the other party-thereby leaving *absolutely no justification* to challenge an arbitration award-would infringe upon the district court's supervisory power which arises out of its inherent power to sanction. *See Chambers,* 501 U.S. at ----, 111 S.Ct. at 2136. Rather than imposing such an extreme standard, we review the district court's exercise of its inherent power to sanction for abuse of discretion. *See United States v. Wallace,* 964 F.2d 1214, 1217 (D.C.Cir.1992), *citing Chambers,* 501 U.S. at ----, 111 S.Ct. at 2136. Accordingly, the question before us is not whether we, sitting as the district court, would have found that defendants engaged in bad-faith conduct and decided to impose sanctions; it is whether the district court abused its discretion in

doing so.

The Supreme Court addressed what constitutes bad-faith conduct in *Roadway Express,* 447 U.S. at 766, 100 S.Ct. at 2464 (citation omitted), where it acknowledged that " '[b]ad faith' may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation."The Court also stated that "[t]he power of a court over members of its bar is at least as great as its authority over litigants."*Id.* (footnote omitted). The record reveals that Huddleston's attorneys are experienced home warranty insurance litigators who have represented similarly-situated home owners in at least five cases against CIGNA, and they are familiar with the arbitration provisions at issue. As stated by CIGNA in its Brief in Opposition to Defendant's Motion to Postpone Consideration of its Application for Confirmation of Arbitration Award,

> *14 [d]efendant's conduct is particularly inexcusable given that his attorneys in this case were also the attorneys of record in *CIGNA Insurance Company v. Tuma,* [No. CA3-91-0571-R (N.D.Tex.1991) ], in which this very judge ordered their clients to submit to arbitration, and enjoined their prosecution of a similar harassing lawsuit filed in state court. Accordingly, defendant's attorneys were fully aware of the applicable law under the Federal Arbitration Act when they brought suit on behalf of defendant in [this case].

Despite their knowledge of the applicable law, defendants-having failed to properly and timely challenge the arbitration award pursuant to 9 U.S.C. §§ 10, 12-have relentlessly assaulted the arbitration award. They have waged these assaults despite the plethora of authority establishing that such challenges raised beyond the three-month limitation period under section 12 of the FAA are untimely. *See supra* Part II.D.2. As recognized by the district court in its order sanctioning defendants, defendants' only justification is authority which "has been criticized by all of the circuits that have considered the issue ...."

Although this case does not constitute one of egregious bad faith, the district court has limited its sanction to attorney's fees in the amount of $7,182.50, and allowed this sanction to be paid entirely by Huddleston's attorneys. Based upon our review of the record-namely, the work CIGNA (and the lower court) was forced to generate by defendants' persistent assaults on the arbitration award-this amount appears reasonable. Moreover, to the extent that the authority cited by defendants bestows some legitimacy to their position, the district court lowered the amount of its sanction accordingly. In light of (1) defendants' familiarity with the FAA, (2) the binding and summary nature of arbitration proceedings under the Act (*see supra* Parts II.C and II.D.1.), and (3) the plethora of authority contrary to defendants' position that affirmative defenses under 9 U.S.C. § 10 can be brought at any time in response to an action to confirm an award under 9 U.S.C. § 9 (*see supra* Part II.D.2), we do not find that the district court abused its discretion by sanctioning defendants for their refusal to be bound by the arbitration award.

## III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's confirmation of the arbitration award and award of attorney's fees in favor of CIGNA in the amount of $7,182.50.

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